No. 6588.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

9

Gilbert S Johnson,

Appellant,

vs.

United States of America,

Appellee.

BRIEF FOR APPELLANT.

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Gilbert S Johnson,

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal to review the judgment and the sentence pronounced upon the appellant Gilbert S. Johnson by the District Court of the United States in the Southern District of California, Central Division.

The indictment was returned on June 19, 1925, against the appellant charging him in six counts with the violation of section 215 of the Criminal Code of the United States. The defendant resisted removal from Fort Worth, Texas, and he was finally ordered removed on the 19th day of December, 1928. Whereupon, the defendant made bond for his appearance in the United States District

Court, in and for the Southern District of California, Central Division. Before pleading to said indictment, the defendant through his counsel filed a motion to quash said indictment, which was on the 15th day of November, 1929, overruled by the Hon. Edward J. Henning, judge of said court, at said time. Thereafter, the defendant entered his plea of not guilty and the case proceeded to trial on November 11, 1930, after a jury had been duly impaneled and sworn to try the issues; the jury thereafter, to-wit, on December 4, 1930, returning a verdict of guilty on the first count of said indictment and not guilty on the other five counts [Tr. 163].

Motions for a new trial and in arrest of judgment filed on behalf of the appellant were overruled by the court.

Upon the verdict, the District Court rendered a judgment imposing a sentence on the first count of said indictment of four years imprisonment in the federal penitentiary at McNeil's Island [Tr. 162].

The Indictment.

Omitting the formal parts, the alleged scheme is attempted to be charged as follows:

That Gilbert S. Johnson, hereinafter referred to as the defendant, heretofore and prior to the several acts of using the United States mails hereinafter set out in this indictment, did devise and intend to devise, a certain scheme and artifice to defraud and to obtain money and property, by means of false and fraudulent pretenses, representations and promises from F. J. Rappe, H. W. Shafer, J. W. Barbee, E. F. Youngman, E. B. Boadway, J. T. Junell, May McCrail, Owen B. Jacoby, M. T. Clark,

W. H. Hemphill, Mrs. S. L. Wright and divers other persons throughout the United States of America, including the public generally, and whose names are too numerous to be set out herein and many of whom are to the grand jurors unknown, all of said persons being hereinafter referred to in this indictment as the persons to be defrauded. The said scheme and artifice was in substance and effect as follows, to-wit:

(1) That the said defendant would acquire or contract to acquire, large blocks of oil and gas leases in what is commonly known as wild-cat territory remote from existing oil and gas production, at nominal prices or through his agreements to drill a test well or wells, for oil and gas thereon.

(2) That the said defendant would then organize and control a succession of trust estates, corporations and concerns, among them being, Lewis Oil and Gas Company, Stephens Oil Syndicate, Texas Trojan Oil Company, Fernando Oil Company, Johnson Oil Company, Unit Production Syndicate, Banner Unit Syndicate, Runnels Oil Syndicate, Mexia-Terrace Oil Company, Corsicana-Mexia Oil Fields Syndicate, Mexia-Powell Oil Syndicate, Fortuna Petroleum Syndicate, Admiral Oil Company, Powell Petroleum Company, Gilbert Johnson and Company, Texas Oil and Stock Exchange, would prepare and cause to be prepared, Declarations of Trust creating each of said trust estates and articles of incorporation creating said corporations, and giving to himself full and complete control of the assets, operations and activities of said trust estates, corporations and concerns.

(3) It was further a part of said scheme and artifice, that the said defendant, after the organization of the respective trust estates, corporations and concerns, and after instituting a campaign for the sale of stock or units of beneficial interests therein, would assign certain oil and gas leases, previously acquired by himself as aforesaid, or portions of such leases, to such trust estates, at enormous and excessive prices and at unlawful and wrongful profit to himself, and would cause such trust estates, corporations and concerns to assume, carry out and complete the original drilling agreements through which such leases were obtained and to assume other obligations thereon, and would withhold and retain for himself, large portions of said leases, acquired as aforesaid, and would use and dispose of the same for his own benefit in fraud of the rights of the stockholders and unit-holders of said trust estates, corporations and concerns, and in fraud of the persons to be defrauded.

(4) It was further part of said scheme and artifice that the said defendant would fix the amount of the capitalization of each of the said trust estates, corporations and concerns, in amounts ranging from one hundred thousand dollars to three million dollars, respectively, without regard to the actual value of the assets of such trust estates then owned or thereafter to be acquired, and greatly in excess thereof, and through the provisions of the respective Declarations of Trust, articles of incorporation and regulations, would authorize himself to increase such capitalization at his will and pleasure, and convenience, and without regard to the actual value of the

assets of such trust estates, then owned or thereafter to be acquired.

(5) It was further a part of said scheme and artifice that the defendant would sell and offer for sale, to the persons to be defrauded, the shares, units and stock of said several trust estates, corporations and concerns, by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth, and would induce the said persons to be defrauded to pay their money to him, the said defendant, which said money he would thereupon, in large part, appropriate to his own use and benefit, and would embezzle and misappropriate the same.

(6) It was further a part of said scheme and artifice, that the said defendant, prior to, and before, the actual organization of some of the said trust estates and before such trust estates had acquired any assets whatsoever, would offer for sale and sell to the persons to be defrauded, stock or units of beneficial interests in such trust estates.

(7) It was further a part of said scheme and artifice, that the said defendant would organize, own and operate so-called brokerage companies, to-wit: Gilbert Johnson and Company and Texas Oil and Stock Exchange, as a medium through which to dispose of the stock or units of interest in the said trust estates and concerns, and as such brokerage concerns would fraudulently contract with himself as an officer and trustee of the respective trust estates and concerns, for the sale of the stock or units of interest of the said trust estates and concerns, and by and through such contracts appropriate to himself large portions of the money and property belonging to the said trust estates.

(8) It was further a part of said scheme and artifice, that the said defendant would, through his so-called brokerage companies, offer for sale and sell to the persons to be defrauded, stock or units of interest in the respective trust estates at gradually ascending prices ranging from slightly less than par value to greatly in excess of par value, through false and fraudulent misrepresentations as to the value of the lease holdings of the respective trust estates and corporations and concerns, the location of such leases as to oil producing or proven oil territory, the progress of development thereon, the assurance of gusher oil production through the drilling or development of the said leases and the unsual, enormous and unlimited profits to accrue to investors in the stocks or units of interest in the respective trust estates without regard to the actual facts or the real values of such stock or units of interest, it being intended wrongfully and fraudulently to lead the said persons to be defrauded to believe that the respective trust estates were growing financially stronger in the ratio represented by the increase in prices at which the stock or units of interest were being offered for sale.

(9) It was further a part of said scheme and artifice to defraud, that the said defendant would drill for oil, a well or wells, for many of the said trust estates, or cause the same to be drilled, upon some one or more of the leases assigned to each of the said trust estates, in a pretended search for oil or gas, and charge such trust estate such exhorbitant and excessive amounts for such drilling that the funds and assets of the said trust estate would be quickly exhausted and the trust estate become insolvent.

(10) It was further a part of said scheme and artifice to defraud, that the said defendant would use certain of the said trust estates, organized by him for that particular purpose, as merger companies, to-wit: the Johnson Oil Company and the Admiral Oil Company, to provide a burying ground for the trust estates previously organized by him and which under his management and control had become insolvent and so recorded and shown on the minute book of the insolvent company, and as a means whereby the persons to be defrauded, who were unit-holders or stockholders of said insolvent trust estates, could be induced to pay to him additional money and property as merger or exchange fees in exchanging their units or stock in said insolvent concerns for the units or stock of said merger companies and as a means of eliminating all such holders of units or stock of said insolvent companies as should refuse or fail to pay such merger or exchange fees.

(11) It was further a part of said scheme and artifice, that the said defendant would arrange mergers of said insolvent trust estates and would fraudulently and unlawfully assign or transfer title of all the remaining assets of such insolvent trust estates, if any, to the so-called merger companies, and then in a further effort to obtain money and property from the stockholders in the insolvent estates, and through and by the use of the United States mails, would notify such stockholders that upon surrender of the stock or units of interest in such insolvent trust estates and the payment to them of a specified exchange or merger fee, within a certain specified time arbitrarily

fixed by said defendant, stock or units of interest in the merger company would be issued to them in exchange.

(12) It was further a part of said scheme and artifice, that in one of the trust estates, to-wit: the Johnson Oil Company, the said defendant, in order to stimulate the sale of its stock or units, would declare and advertise a fraudulent quarterly dividend payable at a future date to stockholders of record on an intervening date and after declaring such fraudulent dividend he would offer for sale and would sell to the persons to be defrauded, stock or units of interest in said Johnson Oil Company, which would participate in such dividend.

(13) It was further a part of said scheme and artifice to defraud, that the said defendant would misappropriate, embezzle and convert to his own use and benefit, a part of the money and property obtained from the persons intended to be defrauded, the exact amount so misappropriated, embezzled and converted being to these grand jurors unknown.

(14) It was further a part of said scheme and artifice to defraud, that the said defendant would make false and fraudulent representations, pretenses and promises to the said persons intended to be defrauded through and by means of divers letters, circular letters, pamphlets, newspapers, house organs, advertisements and publications, circulated and intended to be circulated by and through the United States mails, and in effect and substance as follows, to-wit:

(a) To the effect following, the said representation being made about September 4, 1920, to-wit: That the

last offering of Lewis Oil and Gas stock at 85 cents was then being made; that said stock would be absolutely withdrawn from the market on September 10, 1920; that, therefore, this was the last opportunity to secure an interest in said company; that within 60 days or less it was expected that three big wells on the Sloan tract would be gushing forth big profits for the stockholders; that this was but the beginning of the tremendous certain success of the enterprise; that with the completion of these three wells there was every probability that the earnings of the Lewis Oil and Gas Company would be around $1,000,000.00 a year; whereas, in truth and in fact, as the defendant then and there well knew and intended, it was not intended to withdraw the stock of the Lewis Oil and Gas Company from the market on September 10, 1920, or on any other date, as long as the persons to be defrauded could be induced to purchase the same; that it was not expected that the three wells on the Sloan tract would be gushing forth big profits for the stockholders of said company, nor would the production from said wells be the beginning of tremendous certain success of the enterprise, nor would there be any probability or possibility of the earnings of said company being $1,000,000.00 a year, for the reason that the said defendant then intended that he would by fraudulent devices, appropriate to his own use and benefit, a large part of the income from said wells and would divert to others of his promotional concerns, the balance of said income so that the stockholders of the Lewis Oil and Gas Company would receive little or no part of the same.

(b) To the effect following, to-wit: That the defendant believed that the Stephens Oil Syndicate would be fully financed without the expense of a single dollar to the syndicate members, the entire financing cost to be borne by himself and that every dollar that the members had sent in would go into a drilling fund without deduction of a cent for commissions or expense to anyone; whereas, in truth and in fact, as the defendant then and there well knew and intended, it was at all times intended by said defendant that he would divert to himself in the name of Gilbert Johnson and Company, a large part of the proceeds of money received from the sale of the stock of said Stephens Oil Syndicate under the guise of a bonus and as commissions for the sale of said stock, so that only a portion of the money received from the members of said syndicate could or would go into a drilling fund for the operations of said syndicate.

(c) To the effect that Gilbert Johnson (meaning, thereby, the defendant), of Gilbert Johnson and Company, and president of the big, successful Johnson Oil Company, is president and general manager of the Fernando Oil Company, which in itself assures a competent administration of the affairs of the enterprise (meaning the said Fernando Oil Company), fair and square treatment for the stockholders, and an equitable distribution of all accruing profits; whereas, in truth and in fact, as the said defendant then and there well knew and intended, the Johnson Oil Company was not a big and successful oil company, but was a purely promotional stock selling enterprise, and that said defendant was not a successful or honest executive of any company, but was a promoter of

many fraudulent enterprises and was a confidence man and swindler, and the fact that he was president and general manager of said Fernando Oil Company did not assure a competent administration of its affairs or a fair and square treatment of its stockholders, or an equitable distribution of all accruing profits, but in fact, gave assurance that there would be no distribution of money to stockholders, but that whatever profit accrued would be misappropriated and embezzled by said defendant.

(d) To the effect that after October 7, 1920, there would be no further offerings of Texas Trojan Oil Company stock at any price; whereas, in truth and in fact, as the defendant then and there well knew and intended, the said stock would not be withdrawn from the market and there would be further offerings of said stock as long as the persons to be defrauded could be induced to purchase the same, and said representation was made by the defendant for the purpose of inducing said persons to send their money to him, the said defendant, immediately and without delay, for the purchase of said stock, which said money would be, in large part, misappropriated and embezzled by the said defendant.

(e) That on March 19, 1921, the defendant made the following representations to the persons to be defrauded, to-wit:

> "The Unit Production Syndicate has a total authorized capitalization of only $150,000.00, consisting of 3,000 units of the par value of $50.00 per unit. This No. 1 well will be rushed to completion at the earliest possible moment, and will, I am confident, be placed on production within 75 to 90 days of this date, pos-

sibly sooner. Judging from the production of the Guaranty gusher, and the other wells that have to date been brought in in this amazingly rich pool, it may be depended to come in with production of from 1,000 to 3,000 barrels of high gravity refining oil per day. A total of four wells will be drilled on this 40-acre lease, and the entire property is so thoroughly proven that every one of these four wells is practically certain to be a great gusher. From the facts already established, I believe that I am ultra conservative when I predict that this 40-acre lease of the Unit Production Syndicate will produce from 12,500 to 25,000 barrels of oil per acre, and "the reasonable probabilities greatly exceed even the higher figures. It is upon these figures that I base my estimate that I will be able to pay back to all unit-holders from $250.00 to $500.00 per unit, although it is easily possible for the profits to greatly exceed even the latter figure.

"The bringing in of the No. 1 well with a production of even 1,000 barrels of oil per day and there is every reason to believe that the well will come in with a flow of from 2,000 to 3,000 barrels of oil per day or more, will provide ample funds almost immediately for the payment of liberal dividends to all unit-holders of the Unit Production Syndicate, and also provide ample funds for the drilling of additional wells.

"Hence I am confident that within four to five months from this date the Unit Production Syndicate will begin the payment of big, regular dividends, and these units will, within a comparatively short time, pay profits of from $250.000 to $500.00 each, or in other words, from five to ten times the amount of the investment if units are bought now at the initial price of $50.00 each."

Whereas, in truth and in fact, as the said defendant then and there well knew and intended, there was no basis of fact for the prediction that any well on the property of said syndicate would come in with production of 1,000 to 3,000 barrels of high gravity refining oil per day; that it was not intended to drill four wells on said 40-acre lease; that said property was not thoroughly proven but was, in fact, purely wild-cat property; that there was no basis for the prediction that said 40-acre lease would produce from 12,500 to 25,000 barrels of oil per acre or of any amount remotely approximating said figures, or that said defendant would be able to pay back to the unit-holders from $250.00 to $500.00 per unit, or, in fact, any sum of money; that all the statements made by the defendant in regard to said syndicate and in regard to the prospective production and prospective profits to its unit-holders, were false, fraudulent, extravagant and grossly exaggerated, and were made for the purpose of inducing the persons to be defrauded to purchase said units and with the purpose on the part of the defendant to misappropriate and embezzle a large part of the money so received from the said persons.

(f) To the effect that the organization of the Banner Unit Syndicate had been effected along remarkably conservative lines; that at the time said representation was made, to-wit: on April 16, 1921, preparations had been made for drilling the first well on the syndicate's 100 acres and that 8 or 10 wells would be drilled on said land; that from facts already established regarding the richness of said land, the defendant estimated that the units of said syndicate, which were being offered at $50.00 each, would

ultimately return profits of from $500.00 to $1,000.00 each; whereas, in truth and in fact, as the defendant then and there well knew, the said lease and property of said syndicate was not located in proven territory, nor were any facts established indicating a likelihood of finding oil in paying quantities thereon; that the defendant did not intend to drill 8 or 10 wells on said lease, and there was no foundation for the assertion that the units of said syndicate would return profits of $500.00 to $1,000.00 each or, in fact, any profit whatever.

(g) To the effect that, on May 1, 1921, the Marine Oil Syndicate owned 520 acres of the richest oil territory in Stephens county, Texas, including 320 acres located within 1,000 feet of the great Yeaman No. 1 gusher of the Johnson Oil Company; that the management of said syndicate pledged itself to immediately begin the drilling of two wells on the said land; whereas, in truth and in fact, as the defendant then and there well knew, the said syndicate had not been organized and owned no property at the time said representation was made; that the said Yeaman No. 1 well of the Johnson Oil Company was not a great well or a gusher well, but was only a gas well producing no oil, and that the management of said syndicate (to-wit: the defendant), would not drill two wells but would drill but one; that the 520 acres referred to were not in the part of Stephens county, Texas, where large production of oil was found, and was not the richest oil territory in said county, but was in disproven territory so far as production of oil was concerned.

(h) To the effect that the success of the Johnson Oil Company had been one of the sensations of the oil fields

of Texas; that said company had only begun to grow and that each week, each month and each year would witness said enterprise becoming stronger and stronger, greater and greater, and more and more profitable to its thousands of stockholders; that the defendant was looking forward eagerly to the day when the said company would be a complete unit in the petroleum industry—producers, refiners, transporters and marketers—and that ultimately it would duplicate the gigantic success of the Texas Company and make for every stockholder who held even a fair sized block of the stock an independent fortune; whereas in truth and in fact, as the defendant then and there well knew, the Johnson Oil Company was not then or at any time, a sensational success, but was then experiencing great difficulty in raising money through sales of stock; that it did not at that time, or at any other time, have any prospect of becoming a great oil producing or profit earning institution or of becoming an organization of similar size and commercial importance as the Texas Company; that there was no basis for the profits held out as likely to accrue to investors in the stock of the Johnson Oil ompany, and that the false and fraudulent misrepresentations were made to deceive the persons to be defrauded, and to induce them to turn over money and property to the said defendant without receiving anything of value in return therefor, which said money would be, in large part, misappropriated and embezzled by said defendant.

(i) To the effect that on January 6, 1922, Runnels Oil Syndicate had property holdings of 5,000 acres in one solid block on a clearly defined oil structure; that hundreds

of producing oil wells were a possibility; that stupendous profits were possible and probable for unit-holders of said syndicate; that the defendant believed that well No. 1 of the said syndicate would prove a gusher and that these units, then obtainable at $30.00 per unit, would sell for at least $1,000.00 each; whereas, in truth and in fact, as the defendant then and there well knew, the properties of the said syndicate were purely wild-cat properties; were entirely unproven as oil or gas producing properties; had originally been acquired without cost other than an agreement to drill a test well for oil and gas thereon; were purely speculative; were at a great distance from oil producing fields; that there were no developments in the drilling of the well up to that time, or at any time, that justified or would form a reasonable basis for the defendant's expressed belief that the said well would be brought in as a gusher oil well or would produce oil or gas in any commercial quantities; that there was no basis in fact or in reason for his expressed belief that units of said syndicate would sell for $1,000.00 each upon the completion of said well; that said defendant had held said property with an uncompleted well from October 28, 1919, until July, 1921, as the property of the Lewis Oil & Gas Company, and of the Johnson Oil Company, without making any effort to complete the drilling of the well by those syndicates because of the improbability of finding oil or gas in commercial quantities therein, and that the said false and fraudulent misrepresentations were made by said defendant solely for the purpose of inducing the persons to be defrauded to purchase the units of said syndicate, which were then and thereafter of no value.

(j) To the effect that on April 21, 1922, all available units of the Corsicana-Mexia Oil Fields Syndicate had been subscribed, no more being offered at any price, and hence a large number of the clients of defendant and a great number of the readers of the Texas Oil Bulletin, being the advertisement and publication of defendant, had found it impossible to secure an interest in the Great Powell Structure; that, moved by an overwhelming desire to have every client of Gilbert Johnson and Company, and every reader of the Texas Oil Bulletin participate in the tremendous profits that the defendant was confident would be made by the bringing in of great gushers on the Powell structure, he had personally selected 500 acres of leases on the great Powell structure adjacent to and surrounding the three wells being drilled thereon, and had formed for the development of these leases the Mexia-Powell Oil Syndicate with a capitalization of $150,000.00, divided into 6,000 units of the par value of $25.00 per unit; that said announcement was first, last and only offering of units of Mexia-Powell Oil Syndicate units at $20.00 per unit; that the price of those units would rapidly advance and the bringing in of gusher production in the three wells then rapidly approaching the Woodbine gusher sand on the Powell structure might make them worth anywhere from $250.00 to $500.00 per unit during the few weeks then ensuing:

Thereby causing the persons intended to be defrauded to understand and believe that all the units of the Corsicana-Mexia Oil Fields Syndicate had been sold; that large numbers of readers of the Texas Oil Bulletin and others who were anxious to secure an interest in properties on

the so-called Powell structure were unable to do so and that in order to give these persons such a chance the said defendant had organized the said Mexia-Powell Oil Syndicate purely and solely for the purpose of providing a means whereby these persons could secure an interest in the Powell structure; that 500 acres of leases had been selected for development by the said syndicate and that development upon adjacent leases might make the units of the said syndicate worth from $250.00 to $500.00 per unit within a few weeks:

Whereas, in truth and in fact, as the defendant then and there well knew, all the units of the Corsicana-Mexia Oil Fields Syndicate had not been sold, a large quantity were then available for sale, and would be, and were later offered for sale; that the Mexia-Powell Oil Syndicate had not been organized to provide means whereby those who were unable to secure an interest in the Powell structure through stockholdings in the Corsicana-Mexia Oil Fields Syndicate could secure such an interest, but had been organized on January 10, 1922, six days prior to the organization of the Corsicana-Mexia Oil Fields Syndicate, and efforts had continuously been made to sell its stock or units through a certain brokerage concern during all the intervening time and had proven unsuccessful, and the sale of the stock had been thrown back into the hands of the defendant; that all of the stock of the said Mexia-Powell Syndicate had been issued to the defendant for the said leases at the time the said syndicates were organized;

that this was not the first, last and only offering of units in the said syndicate, and that the defendant would, and did, make further offerings of the said units at $20.00 per share on subsequent dates, and that he would not, and did not, intend to develop the properties of the said syndicate, but would, and did, divert all the money and property of said syndicate to his own use and benefit, and that these false representations, pretenses and promises were knowingly and willfully made in an effort to induce the persons intended to be defrauded to turn over money and property to the said defendant in exchange for these worthless oil stocks and without giving anything of adequate value in return therefor.

(k) That on September 22, 1922, the defendant made the following representation in a circular letter sent to the persons to be defrauded, to-wit:

> "ABSOLUTELY LAST OFFERING OF UNITS OF FORTUNA PETROLEUM SYNDICATE AT TWENTY DOLLARS PER UNIT.
>
> "For the purpose of providing funds to drill the No. 1 Halsell well of the Fortuna Petroleum Syndicate to the pay sand, we offer a limited allotment of these units of the par value of $25.00 per unit at the special price of $20.00 per unit, payable either all cash with order, or one-half cash with order, the balance in 30 days. Notice is hereby given, however, that all orders for units of the Fortuna Petroleum Syndicate at $20.00 per unit must be mailed to us not later than Saturday, September 30, after which this offer will be absolutely withdrawn from the market.

"The Fortuna properties are located in what has already been proven to be one of the richest oil zones in the world. These properties are located on one of the best defined oil structures in this entire zone, the Fortuna properties are of such an extent, aggregating 1,090 acres, that the bringing in of production in the No. 1 Halsell well will make them worth from $1,000,000.00 to $5,000,000.00. The capitalization of the Fortuna Petroleum Syndicate was extremely low, being only 4,000 units of the par value of $25.00 per unit, and the present offering is at the special price of $20.00 per unit.

"The No. 1 Halsell well is now actually under way, and drilling at a depth of about 500 feet by one of the most successful contractors in the business. The rapid completion of this well to the pay sand is absolutely assured. We believe therefore, that within a few weeks time every outstanding unit of Fortuna Petroleum Syndicate will be worth anywhere from $250.000 to $500.00 per unit or more."

Whereas, in truth and in fact, as the defendant then and there well knew, the said properties were not located in one of the richest proven oil zones in the world, but in purely wild-cat territory and remote from oil production; that the properties would not be worth from $1,000,000.00 to $5,000,000.00, but would be, and were, of a purely speculative value, and that no reasonable basis existed upon which a prediction could be made that every outstanding unit would be worth from $250.00 to $500.00 or more, that such statements were made by the said defendant solely for the purpose of deceiving the persons to be defrauded.

(1) That the defendant, on December 1, 1922, made the following representations to the persons to be defrauded in a printed circular entitled "Progress Report No. 2," to-wit:

"IF YOU OWN STOCK OR UNITS OF JOHNSON OIL COMPANY, MARINE OIL SYNDICATE, MEXIA TERRACE OIL COMPANY, CORSICANA-MEXIA OIL FIELDS SYNDICATE, OR RUNNELS OIL SYNDICATE WHICH HAVE NOT YET BEEN EXCHANGED FOR STOCK OF THE ADMIRAL OIL COMPANY, THIS COMMUNICATION IS OF VITAL IMPORTANCE TO YOU.

"When the ADMIRAL OIL COMPANY was organized, every share of the stock was turned back into the treasury, with the exception of only 10,000 shares which was paid out for the lease holdings around which the Admiral Company was organized, and absolutely the only way that Admiral stock can be taken out of the treasury is through the surrender of stock or units of one of the above named enterprises which were absorbed and the payment in cash of the required consideration for such transfer, depending upon which security is surrendered.

"I know positively that the best interests of every individual stockholder have been served in bringing about the consolidation of these several companies into the Admiral Oil Company. Efficiency will be greatly increased, economies will be effected, and through the development of a large number of carefully selected properties large ultimate profits will be absolutely assured. . . . I am going to stay on the job day and night until we make of the Admiral Oil Company one of the giant independent oil projects of the Southwest.

"The Admiral Oil Company has before it a tremendously profitable future, we are confident, and if you own any of the securities which can be exchanged for Admiral stock at this time, do so without fail while the opportunity is still available."

Thereby the said defendant caused the persons to be defrauded, to understand and believe that the entire treasury stock of the Admiral Oil Company was outstanding, and that there would not be any stock for public sale; that the best interest of every stockholder in the various merged syndicates had been served by the bringing about of the merger into the Admiral Oil Company; that the merger would provide for more efficient management and economy of operation; that the development of the large number of properties obtained by the merger would, and did, assure the ultimate earning of large profits for stockholders of the Admiral Oil Company, and that by paying the merger or transfer fees they would participate in such profits; that Gilbert Johnson as president and manager of the Admiral Oil Company, would devote his entire attention to the affairs of the Admiral Oil Company until it became one of the giant independent oil projects of the Southwest; and that said company had in prospect a tremendously profitable future:

Whereas, in truth and in fact, as the defendant then and there well knew, the said defendant had previously increased the capitalization of the said Admiral Oil Company from $1,000,000.00 to $3,000,000.00, and would, and did, thereafter offer its stock for sale to the general public; that the best interests of the stockholders in the various syndicates merged by and into the Admiral Oil Company

would not be served at all by the merger, but that in truth and in fact, the merging of these various insolvent syndicates by and into the Admiral Oil Company was simply another scheme and artifice by which the defendant could and would obtain additional money and property from the persons to be defrauded by and through the payment of the transfer or merger fees; that the consolidation or merger of the several syndicates into the Admiral Oil Company would not bring efficiency in management, or economy in operation as the management and operation of the said syndicates had been a joint and interchangeable operation, and the change of names would not affect inefficiency of the defendant in the operation and management of said Admiral Oil Company or of the merged syndicates; that the development upon the merged properties had already proven them worthless as oil producing properties and that there was little, if any, prospect of ultimate profits of any sort, and in truth and in fact, there never were any profits, and the whole enterprise was a failure, and the purchasers of its stock lost their entire investment, and that Gilbert Johnson, the said defendant, would not, and did not, devote his entire time to the making of the Admiral Oil Company into a giant independent oil project, but would devote his efforts towards making it a giant stock selling enterprise, and to the promotion of other fraudulent stock selling enterprises:

(m) To the effect that any money paid to the stockholders for shares of Johnson Oil Company went into the treasury of the company and had been used for drilling operations; that, although said company had met with some reverses in drilling, nevertheless an honest and

economical effort had been made to develop new production of oil, and that said company was then (July 21, 1922), continuing to make progress; whereas, in truth and in fact, as the defendant then and there well knew, all money received from the persons intended to be defrauded for stock of the Johnson Oil Company was not used for drilling operations, but large sums were appropriated by the said defendant to his own use and benefit; that no honest or economical effort had been made by the defendant to develop new production; that the company did not continue to make progress, but at that time was on the verge of bankruptcy and did make a financial failure; that these statements were made by the defendant for the purpose of deception and of inducing the persons to be defrauded to part with their money and property without receiving anything of value therefor.

(n) That on August 30, 1924, the defendant made the following representations to the persons to be defrauded, in a circular letter sent by mail to said persons, to-wit:

"FORTUNE SMILES

THEN SMILES AGAIN

ON THOSE WHO GRASP THEIR GREAT OPPORTUNITIES QUICKLY

"And before you right now is the kind of an offering that wins the smiles of fortunes.

"In the very limited offering of units of the Powell Petroleum Company are embodied the features that bring forth large and quick profits. Large acreage, low capitalization and a rapid development campaign have many times meant fortunes won.

"BUT! REMEMBER! In addition to these features, the location for the first well of the Powell Petroleum

Company on their Greer lease has been made where they have actual, tangible assurance of bringing in a real gusher well. In addition to large acreage, low capitalization and a rapid development campaign you have actual assurance of production, without which these other features would be of little value.

"Many offers are made to participate in the drilling of wells. BUT! How many of these offers have any real assurance that the drilling of those wells will result in success? And right on this point investors can be assured hinges their opportunities of gaining financial independence with a modest investment. When the details of an offering are under consideration, let your most careful attention be directed at this feature. The first question to ask yourself is: "What assurance is there of actually securing production?

"In the offering of a small number of units of the Powell Petroleum Company can plainly be seen the assurance of an investment in these units resulting in splendid profits. In profits of 1000% in sixty days and greater profits with the further development of their properties. And to the investor who has enough energy and foresight to secure some of these units before they are all taken, just such profits should quickly accrue.

"The exact structures underlying the properties of the Powell Petroleum Company have been so well defined and the existence of a great pool of oil has been so amply assured through an expenditure of more than one hundred and fifty thousand dollars in drilling operations that the outcome of the Powell Petroleum Company Greer No. 1 well can hardly be other than a great woodbine gusher. Which should mean a profit on every dollar placed into this exceptional offer of 1000% in sixty days time and greater profits to follow.

"When an offering has even a fair chance of returning a profit of 1000% in sixty days time, with additional profits to follow, that offer is worthy of careful consideration. But—when in addition real assurance of realizing those profits and realizing them in so short a time is given, as it is in the limited offering of units in the Powell Petroleum Company, then that offer should be grasped quickly—before it has moved into the past."

Whereas, in truth and in fact, as the defendant then and there well knew, he had no actual or tangible assurance that the said well would be brought in a real gusher oil well or that it would produce oil in commercial quantities or at all, but in fact and in truth, he knew that the prospects of this well finding oil in any commercial quantity, or at all, had been disproven by the wells previously drilled by him on adjacent properties and which proved to be dry holes and not oil producers; that there was no basis in reason or in fact assuring the earnings of profits by the said company, and that there were no prospects of paying 1000 per cent in profits or any profits, to stockholders of the said company within sixty days or at any time, and in truth and in fact, the said well was completed as a dry hole, and no profits were ever earned by the said company; and that these false and fraudulent representations, pretenses and promises were purposely made to deceive the said persons to be defrauded and to induce them to pay their money to the said defendant without receiving anything of value in return therefor, which said money would be, by the defendant, misappropriated, embezzled and converted to his own use and benefit.

(o) And the Grand Jurors say and present that the defendant made many other false, inflammatory, exaggerated and gross misrepresentations, pretenses and promises, too numerous to mention or set forth herein, for the purpose of causing and inducing the persons to be defrauded to believe that they might make and would be safe in making safe and profitable investments in the shares, units and interests of the several corporations, trust estates and concerns hereinbefore mentioned, when in fact the said representations, pretenses and promises were and would be false and untrue and were and would be made by the defendant without any reasonable foundation to believe them to be true, and in fact were and would be known by the defendant to be false and untrue, and with the intent on the part of said defendant to appropriate to his own use and to embezzle and misappropriate a large part of the money to be paid and which was paid to him by the persons to be defrauded.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said defendant, on the 5th day of October, in the year nineteen hundred and twenty-two, at Los Angeles, California, in the Southern Division of the Southern District of California, and within the jurisdiction of this court, for the purpose of executing said scheme and artifice, unlawfully, willfully, knowingly and feloneously caused to be delivered by mail of the United States according to the direction thereon a certain letter * * * etc.

The succeeding five counts upon which the defendant was acquitted incorporate the same alleged scheme by reference.

ASSIGNMENT OF ERRORS 1 AND 2.

Motion to Quash Indictment.

The grounds relied upon in the motion to quash the indictment filed in this case are set forth in said motion which we herein set forth in full together with the points and authorities that were submitted therewith at said time:

To the Honorable Judge of Said Court:

Comes now the defendant, GILBERT S. JOHNSON, in the above entitled cause and moves the court to quash the indictment herein because said indictment, and each and every count thereof, is fatally and fundamentally defective and void upon its face for the following reasons, to-wit:

(1) Said indictment and each and every count thereof, fails to charge the crime against the laws of the United States pursuant to Section 215 of the Criminal Code.

(2) Said indictment, and each and every count thereof, fails to inform the defendant of the nature and cause of the accusation against him, in this, that said indictment charges only in general terms and this defendant will be unable to meet the charges of such a general nature.

(3) Because said indictment charges and attempts to charge other and different crimes and offenses not contemplated by Section 215 of the Criminal Code of the United States, which section contemplates only the misuse of the United States mail in furtherance of schemes to defraud, in this, that said indictment in paragraph 5 of page 3, solemnly charges the defendant with the crime of embezzlement, which said crime is not contemplated by Section 215 of the Criminal

Code. And again, in paragraph 13 of page 6 of said indictment, defendant is again charged and attempted to be charged with the crime of embezzlement.

(4) Because said indictment, and each and every count thereof, is founded upon malice, passion and prejudice, in this, that in paragraph (c) on page 8 of said indictment, the defendant is charged and attempted to be charged with being "a promoter of many fraudulent enterprises and was a confidence man and swindler," which said charges, are crimes and offenses not contemplated or cognizable by the laws or statutes of the United States, and particularly, Section 215 of the United States Criminal Code, and the same paragraph further charges and attempts to charge the crime of embezzlement.

(5) Because said indictment, and each and every count thereof, further charges and attempts to charge the defendant with the crime of embezzlement, in this, that said charge or attempted charge is found in paragraph (d) of page 8 of said indictment. This same vice is found in paragraph (e) on page 9 of said indictment, and again the same charge is found in paragraph (h) on page 11 of said indictment.

(6) Because said indictment in paragraph (n) of page 19 again charges and attempts to charge the defendant with the crime of embezzlement and conversion, which said crimes and offenses, are not cognizable by Section 215 of the United States Criminal Code. The same vice is found in paragraph (o) on page 19 of said indictment.

(7) Because said other crimes charged and attempted to be charged, to-wit: the crimes of embezzlement and conversion, and also denominating the defendant as being "a promoter of many fraudulent enterprises," and further designating him as being

"a confidence man and swindler," tend to degrade the defendant and are highly prejudicial, and will prevent him from having a fair and an impartial trial under Section 215 of the Criminal Code, as guaranteed to him by the Constitution and laws of the United States.

WHEREFORE, defendant prays that this motion to quash be sustained and said indictment dismissed and that he be discharged.

(Signed) MCLEAN, SCOTT & SAYERS,
(Signed) H. L. ARTERBERRY,
Attorneys for Defendant.

Points and Authorities in Support of the Motion to Quash.

An indictment must be so clear and exact in its language as to advise the accused and the court beyond doubt of the offense intended to be charged, *Rumley v. United States*, 293 Fed. 532 (C. C. A. 2).

In an indictment for use of mails in furtherance of a scheme to defraud, the particulars of the scheme are matters of substance and must be set forth with sufficient certainty to acquaint the defendant with the charge against him. *Savage v. United States*, 270 Fed. 14 (C. C. A. 8.)

In the case of *United States v. Howard*, Fed. Cas. No. 15, 403, Mr. Justice Story, in discussing the tests of surplusage and of material variance, used this language:

"The material parts which constitute the offense charged must be stated in the indictment, and that must be proved in evidence. But allegations not essential to such a purpose, which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment;

are considered as mere surplusage, and may be disregarded in evidence. But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage."

See also *Mathews v. United States*, 15 Fed. (2d) 139-143 (C. C. A. 8).

The case of *Naftzger v. United States*, 200 Fed. 494 (C. C. A. 8), holds that an unnecessary allegation which, however, was descriptive of the identity of something which was legally essential to the charge, could not be considered surplusage.

Kercheval v. United States, 12 Fed. (2d) 904-908, holds that conversion is not an element of crime under Section 215 of the Penal Code; see also *Nelson v. United States*, 16 Fed. (2d) 71-75 (C. C. A. 8).

In the very recent case of *Beck v. United States*, reported in the advance sheets of August 1st, 1929, 33 Fed. (2d) 107 (C. C. A. 8).

At page 109, among other things, the court says:

> "There follows five printed pages of "representations," all of which, are alleged in the most general terms to be false and untrue. It is not alleged wherein they are false. It is true, as claimed by appellant, that there are many instances wherein order to comply with the constitutional requirements of certainty in the accusation, a pleader should not only allege the falsity of the misrepresentation, but "allege affirmatively in what the falsehood consisted." 25 C. J. 628. But the particular vice of this indictment reaches farther than that; the unfair part of it is that

> the defendant is charged with falsely representing many things which counsel for the government assure the court are not false at all."

In connection with the *Beck* case, *supra*, it is particularly interesting to note on page 110 thereof, in discussing the indictment in said case and what was generally referred to as the "shotgun" clause, and comparing same with paragraph (o) on page 19 of the indictment in this case, wherein the same vice is found in the present indictment that was condemned by the court in the *Beck* case and in this connection, we shall quote a part of the language of the court in the *Beck* case:

> "The quoted "shotgun" clause is in such general terms that it is unfair to the defendants. It gives them no inkling of what facts may be concealed in the underbrush of glittering generality, and no opportunity to defend against them. The courts are properly lenient with regard to the form of an indictment which substantially advises the defendant of the charge; they are likewise critical of a charge which is that in form alone, and can serve no purpose save as a foundation for evidence that will catch the defendant off his guard. In the early history of civil pleading, plaintiffs used to allege certain acts of negligence and then quietly add "on account of the aforesaid and other negligent acts." Occasionally, it is still done; but not when the court's attention is directed thereto. The Constitution compels that the rule of criminal pleading should be at least as fair. A trial judge would be justified in sustaining a demurrer to an indictment with such Mother Hubbard allegations; or in treating it as surplusage. In this case, neither course was taken. The motion for a bill

of particulars was asked and denied. While such a motion is generally within the sound discretion of the court, it should have been sustained."

In the case of *U. S. v. Cruikshank*, 91 U. S. 442, the Supreme Court laid down the following rule:

> "It is an elementary principle of criminal pleading that when the definition of an offense, whether it be of common law or by statute, includes generic terms, it is not sufficient that the indictments which charge the offense be in the same generic terms as in the definition, but it must state the species; it must descend to particularities."

In the case of *U. S. v. Hess*, 31 L. Ed. 518, the Supreme Court said:

> "The object of the indictment is: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of a conviction or acquittal, for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be had, for these facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place and circumstances."

In the case of *Brenner v. U. S.* 287 Fed. 640, opinion by the Circuit Court of Appeals, Second Circuit, Justice Manton speaking for the court, used this language:

> "It is essential to the sufficiency of the indictment that it set forth the facts which the pleader claims constitute the alleged criminal breach, so distinctly as

to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense so particularly as to avail himself of a conviction or acquittal in advance of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts as stated are sufficient to support a conviction. Fontana v. U. S., 262 Fed. 283. The indictment must charge the offense in more than the generic terms as in the definition. It must descend to particularities. U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. A crime, unless otherwise provided by statute, is made of acts and intent, and they must be set forth in the indictment with reasonable particularity as to time, place and circumstances. Such particularities are matters of substance and not of *form, and their omission is not aided or cured by a verdict.*"

In *U. S. v. Hess,* 124 U. S. 483, 31 L. Ed. 516, it is said: "The essential requirements indeed or the particulars constituting the offense of devising a scheme to defraud are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by a verdict."

In the case of *U. S. v. Potter,* 56 Fed. 89-90, the Circuit Court of Appeals, speaking through Judge Putnam, used this language:

"In order to properly inform the accused of the 'nature and cause of the accusation,' within the meaning of the Constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated minds, that not only must all the elements of the offense be stated in

the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons and things and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offense. These rules are well expressed in U. S. v. Cruikshank, 92 U. S. 542, as follows:

'In criminal cases prosecuted under the laws of the United States the accused has the constitutional right to be informed of the nature and cause of the accusation.' Amendment 6 in U. S. v. Mills, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged'; and in U. S. v. Cooke, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'including generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' 1 Arch Cr. Pr. & Pl. 291. The ob-

ject of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.' "

In the case of *Anderson v. U. S.,* 294 Fed. 597, opinion by the Circuit Court of Appeals, Second Circuit, the court held:

> "The crime must be charged with precision and certainty, and every ingredient of which it is composed, must be accurately and clearly alleged. Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830. To allege that what was done was unlawful is merely to state the conclusion of the pleader. Brenner v. U. S., *supra.* The facts supporting the legal conclusion must be alleged. To admit this essential fact is to render the indictment void."

In this connection see also *Goldberg v. U. S.,* 277 Fed. 215, opinion by the Circuit Court of Appeals, Eighth Circuit; *Reeder v. U. S.,* 262 Fed. 38, opinion by Elliott, District Judge, *certiorari* denied by Supreme Court, 64 L. Ed. 726.

The defect in the indictment for failure to charge the defendants with any criminal act distinctly and expressly, with precision and certainty, is not cured by the "whereas clauses" set forth in said indictment.

In the case of *Dalton v. U. S.*, 127 Fed. 547, the Circuit Court of Appeals, Seventh Circuit, had this very question under consideration. The court, speaking through Judge Jenkins, had this to say:

> "We then come to the 'whereas' clause. which is not an allegation of a scheme, but is a negation—a denial of the truth of preceding allegations. This word 'whereas' implies a recital, and, in general, cannot be used in the direct and positive averment of a fact. It is thus defined:
>
> (1) The thing being so that; considering that things are so; implying an admission of facts, something followed by a different statement, and sometimes by inference of something consequent. (2) While on the contrary; the fact or case really being that; when in fact.' (Century Dictionary.)
>
> The statement sought to be negatived by the 'whereas' clause should have been made positively in the indictment, the purpose of the 'whereas' clause being to set forth the real truth concerning the allegations supposed to have been theretofore averred. The difficulty here is that the allegations thus denied are not positively charged in the indictment to be part of the scheme to defraud. If it be a denial of anything averred, it is a denial of the allegations of the pleader with respect to the class of persons intended to be defrauded."

In the case of *Foster v. U. S.*, 253 Fed. 482, the Circuit Court of Appeals, Ninth Circuit, speaking through Judge Gilbert, used this language:

> "The plaintiffs in error had the constitutional right to be informed of the nature and cause of the accusation against them. To furnish them with that infor-

> mation it was necessary to set forth in the indictment the particular facts and circumstances which rendered them guilty and to make specific that which the statute states in general."

Misconduct of Counsel in Drafting Indictment.

Counsel for the government may be guilty of misconduct just as prejudicial to the rights of a defendant as in making final argument to the jury in the case, by display of malice, hatred, contempt, ridicule or scorn, and making assertions and statements not based on truth or fact. Because in the latter case, defendant's counsel could make a proper objection and protect the rights of the defendant from such unwarranted abuse. While in the first instance, by heaping unwarranted abuse on a defendant under the guise of a solemn accusation by a grand jury in the form of an indictment; much greater harm and injury can result from attacks of that nature, than in the latter case. And it is these tactics to which we desire to direct the court's attention to the misconduct and evident unfairness of the drafter of this indictment, when he, knowingly and deliberately, inserted a lot of accusations which have no proper place in an indictment such as this. For instance, the indictment in the present case is literally honeycombed with charges and accusations against this defendant, charging that he *misappropriated, embezzled and converted* to his own use and benefit, large sums of money and property alleged to have been acquired by him

in furtherance of the alleged scheme to defraud. This, in the face of all the courts saying that such allegations constitute no part or parcel of a mail fraud indictment. Not satisfied with these allegations, which are repeated in practically every paragraph of the alleged scheme to defraud, but the alleged scheme, and particularly paragraph (o) on page 19 of said indictment, contains what the court describes and condemns in the *Beck* case, as the "shotgun" clause.

Not satisfied with the wrongful allegations above referred to, but the pleader in this case so far forgets himself as to make charges against this defendant under the guise of a solemn charge of a Grand Jury of the United States, in charging this defendant with being "a confidence man and swindler," when the pleader knew, or by the slightest investigation, could have known, that this defendant has never been even as much as charged, much less, convicted of any offense against the laws of the United States, or of any state within the United States. This, in the face of the elementary principle that every man is presumed to be innocent until proven guilty.

We submit that all these unwarranted, unjustified, malicious, and slanderous statements, have only one purpose and effect, and that is to so prejudice this defendant before a jury upon the trial of said case, that he will be denied a fair and an impartial trial, as guaranteed to him by the laws and Constitution of the United States.

We further submit that such allegations cannot be treated as mere surplusage, as they are collateral to and a part of the main charge of the indictment. We, therefore, respectfully submit that the indictment in this case should be quashed and held for naught, and defendant be discharged. See:

> *Beck v. United States*, 33 Fed. (2d) 107-113 (C. C. A. 8);
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> *Latham v. United States*, 226 Fed. 420 (C. C. A. 5);
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> *De Luca v. United States*, 298 Fed. 416;
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> *United States v. Gradwell*, 227 Fed. 243;
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> *Agnew v. United States*, 165 U. S. 36-45;
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> *United States v. American Tobacco Co.*, 177 Fed. 774;
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> *United States v. Nevin*, 199 Fed. 833;
>
> *McKinney v. United States*, 199 Fed. 29 (C. C. A. 7);

Which said motion to quash was overruled by the court and duly excepted to. [Tr. 57-59.] The assignment of errors [Tr. 235-253] relate (1) to the overruling of the motion to quash said indictment and to the introduction of any testimony in support of said indictment based on the grounds set out in said motion to quash and (2) for the failure and refusal of the court to give certain requested instructions requested by the defendant, and (3) for errors committed by the court in giving certain instructions to the jury which were duly excepted to at said time.

ARGUMENT.

Misconduct of District Attorney.

The question presented in Assignments of Errors Nos. 1 and 2, so far as we have been able to find, is without precedent, and we will of necessity be compelled to argue from analogy.

We fully appreciate that courts are somewhat lenient in cases of claimed misconduct of prosecuting officers for things said or done in the heat of a hotly contested case, and especially so, when the matters complained of have been provoked perhaps by defense counsel, but the rule is entirely different when the matters complained of have been studiously and intentionally injected into a case.

For instance, we refer specifically to the charges made in the indictment in this case as follows:

In paragraph No. 5 of said indictment [Tr. pp. 5 and 6] this allegation is made: "and would embezzle and misappropriate the same," and again in paragraph No. 13 of the indictment [Tr. p. 9] "that the said defendant would misappropriate and embezzle and convert to his own use and benefit a part of the money and property obtained from the persons to be defrauded, the exact amount so misappropriated, embezzled and converted being to these Grand Jurors unknown," and again in Subdivision (c) of said indictment [Tr. p. 11] "that said defendant was not a successful or honest executive of any company, but was a promoter of many fraudulent enterprises and was a *confidence man and swindler.*"

We have taken excerpts from only a few of the paragraphs and subdivisions of said indictment, and upon a careful reading of the whole indictment this same vice appears in practically every paragraph and subdivision thereof. It therefore cannot be said that this vice was unintentional, but on the contrary, this scurrility and abuse is repeated again and again. For what purpose, and why? It seems to us quite apparent. Then as a final and parting shot, the pleader injects the famous subdivision (o) of said indictment [Tr. p. 27]. A similar indictment or an indictment containing similar language to the last mentioned subdivision (o) has been very aptly and appropriately described in the case of *Beck v. United States*, 33 Fed. (2d) 110, which refers to such a charge as the "shotgun clause" with its "Mother Hubbard" allegations.

As to the misconduct of counsel, we desire to quote from the *Beck* case, *supra*, at page 114, as follows:

> "A trial in the United States court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record for convictions.
>
> The Supreme Court of the United States has very recently reversed a case because of improper argument by counsel. Although the case was one to which the government was not a party, the court spoke in strong language:

> "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. See Union Pac. Ry. Co. v. Field (C. C. A.) 137 F. 14, 15; Brown v. Swineford, 44 Wis. 282, 293 (28 Am. Rep. 582). Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error."

The case of *Volkmor v. U. S.* 13 F. (2d) 594 (C. C. A. 6) holds that personal abuse of a defendant by counsel in argument, though the remarks were withdrawn, held error so egregious as to require reversal of a judgment of conviction, and among other things the court says at page 595: "This is not a case of inadvertence of statement, but of intentional abuse."

Compare *Warfield v. U. S.* 36 F. (2d) 903-904 (C. C. A. 5).

Indicting Citizens in Foreign Jurisdictions.

We shall refer to this phase of the case only for the purpose of showing unfairness from the inception of this case to its very end. We are willing to concede that the prosecuting officers of the government have the power and the right, legally, to indict in any jurisdiction, in cases

such as this, wherever letters may have been delivered in furtherance of a scheme to defraud, but in this connection, we desire to call the court's attention to some rather illuminating cases whereby the Supreme Court of the United States, and inferior courts, condemn that practice as being unfair to a defendant, particularly the case of *Beavers v. Henkel,* 194 U. S. 73, 48 L. Ed. 886, the Supreme Court, speaking through Mr. Justice Brewer, uses this language:

> "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection."

And again the Supreme Court passing on this same question of indicting citizens in distant states and jurisdictions from that of their domicile, wherein an indictment would lie, comdemned such practice in the case of *Hyde v. Shine,* 199 U. S. 62, 50 L. Ed. 94. The court, speaking through Mr. Justice Brown, used the following language:

> "But we do not wish to be understood as approving the practice of indicting citizens of distant states in the courts of this district, where an indictment will lie in the state of the domicile of such person, unless in exceptional cases, where the circumstances seem to demand that this course shall be taken. To

require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship to which he ought not be subjected if the case can be tried in a court of his own jurisdiction."

See also *Tinsley v. Treat,* 205 U. S. 689.

And again some rather illuminating language is used by Judge Anderson, now Circuit Judge of the Seventh Circuit, in the case of *United States v. Smith,* 173 F. 232; in refusing to remove a defendant who had been indicted in a foreign jurisdiction, among other things he said:

> "To my mind, that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this. If the history of liberty means anything, if constitutional guaranties are worth anything, this proceeding must fail. If the prosecuting officers have the authority to select the tribunal, if there be more than one tribunal to select from, if the government has that power, and can drag citizens from distant cities to the capital of the nation, there to be tried, then, as Judge Cooley says, 'This is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial.' "

No doubt this court is already aware that in the last session of the Sixty-ninth Congress in the Senate proceedings of June 30, 1926, pages 12,331 to 12,333, this very matter was the subject of considerable debate and discussion, so much so, that as an outgrowth of said discussion, a bill was introduced in both houses of Congress,

namely, Senate Bill No. 5144 of January 8, 1927, and House Bill No. 16,256 of January 13, 1927, which proposed to amend Section 215 of the Criminal Code to prevent and prohibit the very practice complained of here and condemned by the Supreme Court.

As heretofore stated, that notwithstanding the condemnation of the courts in matters of this sort, they are compelled to order the removal of a defendant who has been thus indicted, but the point we make is, that when the prosecuting officers of the government see fit to put a defendant at such a disadvantage by dragging him half way across the continent to be tried before strangers in a strange land, they should at least be fair enough in presenting an indictment without the use of slanderous and scurrilous abuse being placed in said indictment such as is the case here. We respectfully insist that the unfairness in taking a man away from home to prosecute him, that the defendant is at least entitled to reasonable protection and a fair trial, which we insist has not been accorded here, either by the prosecuting officers or the trial judge.

We shall now take up the assignments of error relating to requested instructions which were refused and the assignments of error relating to the charge as given by the trial court and which were duly excepted to at the time.

Errors in Refusing Requested Instructions.

Errors Number III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV.

All relate to the refusal of the court to charge the jury as requested by the defendant. [Tr. 236-242.]

We believe that the defendant was entitled to each and every one of the requests that have been listed in the Assignment of Errors III to XV inclusive.

Error No. V.

We desire to call particular attention to Assignment Number Five [Tr. 237] wherein the defendant requested the following instruction:

> "The defendant cannot be convicted unless you believe beyond all reasonable doubt that he made false representations with the intent to defraud. An incorrect statement, grossly misrepresenting facts, does not amount to fraud in law, unless the false representations were knowingly and wilfully made with fraudulent intent."

We believe that the defendant was clearly entitled to have that charge go to the jury and we base our opinion upon the following cases:

> *Slakoff v. U. S.* 8 F. (2d) 6 (C. C. A. 3);
> *Yusem v. U. S.* 8 F. (2d) 9 (C. C. A. 3);
> *Horn v. U. S.* 182 Fed. 721-737 (C. C. A. 8).

Error No. VI.

The defendant's requested instruction referred to herein as Error Number Six reads as follows:

> "It is common knowledge that most business enterprises are aided by advertisements passing through the mails and at every hand we see claims of capacity, performance and results which we know cannot stand cross-examination. Parties who have anything to sell have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing

in the course of business to exaggerate the merits of goods people have to sell and within any proper, reasonable bounds, such a practice is not criminal. It must amount to a substantial deception."

The above request which we think the defendant was entitled to have given was based upon the case of *Harrison v. U. S.*, 200 Fed. 662-666 (C. C. A. 6).

Error No. VII.

The defendant's requested instruction referred to herein as Error Number Seven reads as follows:

> "You are instructed that a man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure, be incapable of committing a conscious fraud. If you believe that the defendant in this case, really entertained the belief of the ultimate success of his projects, corresponding with his representations, he did not commit the offense charged and you should return a verdict of not guilty. The significant fact is the intent and purpose. The question presented to you in this case is not whether the business enterprises of the defendant, Gilbert S. Johnson, were practicable or not, if you believe from the evidence that the defendant entered, in good faith, into these business enterprises, believing that out of the monies received he could, by investment or otherwise, make enough to repay said investors according to his promises, he is not guilty, no matter how visionary might seem his plan or scheme."

The above requested instruction, we believe, the defendant was clearly entitled to have submitted to the jury, and for our authority we call the court's attention to the case of *Sandals v. U. S.* 213 Fed. 569 (C. C. A. 6).

Error No. XIV.

The defendant's requested instruction listed herein as Error Number Fourteen reads as follows:

> "If upon a fair and impartial consideration, of all the evidence in the case, the jury finds that there are two reasonable theories supported by the testimony in the case, and that one of such theories is consistent with the theory that the defendant is guilty, as charged in some one or more or all of the counts in the indictment, and that the other of such theories is consistent with the innocence of the defendant, then it is the policy of the law, and the law makes it the duty of the jury to adopt that rule which is consistent with the innocence of the defendant and in such case to find the defendant not guilty."

Upon that proposition we desire to call the court's attention to the following authorities:

Union Pac. Coal Co. v. U. S., 173 Fed. 737-740 (C. C. A. 8);
People v. Ward, 105 Cal. 335-341;
People v. Murray, 41 Cal. 66-67;
Vernon v. U. S., 146 Fed. 123 (C. C. A. 8);
Isbell v. U. S., 227 Fed. 792 (C. C. A. 8);
Wright v. U. S., 227 Fed. 857 (C. C. A. 8);
Harrison v. U. S., 200 Fed. 664 (C. C. A. 6);
Hart v. U. S., 84 Fed. 804 (C. C. A. 3);
Weiner v. U. S., 282 Fed. 801 (C. C. A. 3);
Edwards v. U. S., 7 Fed. (2d) 360 (C. C. A. 8);
Ridenour v. U. S., 14 Fed. (2d) 892 (C. C. A. 3);
Haning v. U. S., 21 Fed. (2d) 509-510 (C. C. A. 8);
Van Gorder v. U. S., 21 Fed. (2d) 939-942 (C. C. A. 8);
Nosowitz v. U. S., 282 Fed. 575-578 (C. C. A. 2);
McLaughlin v. U. S., 26 Fed. (2d) 3 (C. C. A. 8).

Error No. XVI.

The defendant's instruction listed herein as Error Number XVI reads as follows:

> "You are instructed that it is a matter of common knowledge that beginning in the year of 1921, the business of the country generally passed through a period of deflation and depression that brought loss and even ruin to business enterprises of supposed soundness and strength, and you are further instructed that from the evidence in this case, it appears that the price of oil in the State of Texas fell from a price of $3.50 per barrel to $1.00 per barrel and this is one of the reasons that the defendant ascribes to some of his misfortunes in the oil business, and if you so believe, you should give the defendant the benefit of such condition and take these facts into consideration with all the evidence in this case."

We believe that the defendant was entitled to the above requested instruction and base our reasons therefor upon the following authorities:

Corliss v. U. S., 7 F. (2d) 455 (C. C. A. 8);
Mandelbaum v. Goodyear Tire and Rubber Co., 6 F. (2d) 818 (C. C. A. 8).

We do not believe that these requested instructions were sufficiently covered in the court's general charge and, therefore, it was error to refuse these requests.

Errors in Court's Charge to the Jury.
Error No. XVII.

THE 17TH ASSIGNMENT OF ERROR IS AS FOLLOWS:

Said District Court erred in giving the following instruction to the trial jury:

"You will remember that the defendant—apparently, he must have been a very young man—started in the town of Goldfield, promoting, according to his own admissions, promoting enterprises similar to this, and through the course of a good many years, he says that he has been selling stocks by means of the United States mails. He even condemns the government for interfering with his scheme, in some of the circulars, in which you will remember that he criticized the government and the postal authorities for interfering. He explained, I think, to some of the investors that except for the pernicious activity of the postal officials the enterprise would have continued.

"Now, no prejudice is to be entertained against one who does that, because the advertising of goods is legitimate. It is done all the time, and within certain limits a person has a right to what is known 'to puff his wares.' That is very true. The fact, however, that the defendant says he believed all these things that were stated, does not necessarily control you in your judgment. *You do not have to believe that if I am caught in the act of setting fire to a house and I say to the officer, 'Well, I did not intend to burn that house,' he does not have to believe that, and probably would not."* [See page 243 of the Transcript for this assignment of error and see pages 211 and 212 of the Transcript wherein this language appears in the charge of the court.]

The defendant made the following exception to the charge:

"I except to the court's instruction with respect to the operations of the defendant with respect to his Goldfield operations as being similar to those charged in this indictment, it not being mentioned in the in-

> dictment." [Tr. p. 219.] "And I, furthermore, take exception to the court's comment on the facts and the analogy or the example which the court gave with respect to the commission of arson, or the burning of a building and particularly in that kind of a case the matter of intent of the defendant is not involved, and an example of that kind being prejudicial to the rights of the defendant, whereas, the matter of intent to defraud is the very crux of this case." [Tr. p. 222.]

This court is familiar with the rule that in cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances and his other acts of a kindred character, both prior and subsequent, *not too remote in time,* are admissible in evidence. See *Moffatt v. U. S.*, 232 Fed. 523-533 (C. C. A. 8). Compare the above with the language in the charge of the court [Tr. p. 211]:

> "You will remember that the defendant apparently —he must have been a very young man—started in the town of Goldfield, promoting, according to his own admissions, promoting enterprises similar to this, and through the course of a *good many years,* he says that he has been selling stocks by means of the United States mails."

Needless to say, that matter was gone into on cross-examination by counsel for the government over the objections of the defendant and exceptions to that portion of the charge is found at [Tr. p. 219].

Also, we call the court's attention to the case of *Sunderland v. U. S.*, 19 Fed. (2d) 202-214 (C. C. A. 8), relative to that portion of the charge in the illustration given about burning a house.

Error No. XVIII.

THE 18TH ASSIGNMENT OF ERROR IS AS FOLLOWS:

"There is evidence here that at one time he advertised that he had a certain lease and it would be the general understanding among oil people that all leases are subject to a royalty payment; that is the general understanding—and the court will take note of that—among oil men, so by saying that he owned a lease, that implies the owning of a lease subject to a royalty payment. That is all right. This defendant, however, did not say he owned only a one-half interest in it. Now, and, by the way, the defendant was to claim that certain explanations were made in some of his publications. So far, however, I have no recollection of any evidence of that fact, so it stands before you uncontradicted that he gave the customers to understand that he owned the lease, whereas, in fact, he owned only one-half of it. Now, that might be an oversight; it might have been unintentional. To my mind, that is not so very flagrant, but it is illustrative. *They say that 'straws tell which way the wind blows.' Now, it might be that the defendant did not consider that extremely important, but he was used to making reckless statements. That is an element that you may consider properly in this case, that there were extravagant statements made. Of course, there is no denying that.* For instance, I think it was yesterday afternoon, something was shown here where it was said that a big gusher was absolutely assured, a big gusher absolutely assured. *Now, it is difficult, gentlemen of the jury, to reconcile that with honest belief in anybody.* 'Assured' means, as we all know, 'sure,' 'that it was sure'; and it is significant, gentlemen, that every single one of these statements contains an invitation to buy stock; every single one without exception, so far as I remember, is an invi-

tation to buy stock—not only an invitation, but an urgent invitation. *Well, now, the defendant might have been entirely innocent; he might have honestly believed that, but his honest belief is not sufficient unless the facts warranted him in expressing such belief, unless his information and facts warranted him.*

"The evidence in this case shows that from the very beginning this defendant pursued a consistent line of advertising, and I will not, I think, go too strong in calling it *extravagant advertising.* It is a little singular, gentlemen, that if he was honest in his belie. that that continued."

The defendant made the following exception to the charge

"I take exception to the court's comment upon the facts in the case as being unfair and prejudicial to the defendant, and particularly to the court's comment with respect to the owning of a certain lease and the court's comments with respect to the failure of the defendant to show a correction of any such statement contained in the literature." [Tr. p. 222.) "And then I also except to the court's remarks with respect to the course of conduct of the operations of the defendant generally, and particularly with respect to his having made those reckless or extravagant statements as designated by the court over a course of five years." [Tr. p. 223.]]See pages 212 and 213 of Transcript] wherein this language appears in the charge of the court.

In this assignment of error we think the court's charge was very unfair and highly prejudicial to the defendant, wherein the court's opinion is substituted for that of the jury when it stated that "he was used to making reckless statements" and "that there were extravagant statements

made. Of course, there is no denying that." And again, "Well, now, the defendant *might* have been entirely innocent; he *might* have honestly believed that, *but his honest belief is not sufficient* unless the facts warranted him in expressing such belief, unless his information and facts warranted him," and other similar language.

In our opinion such a charge is tantamount to telling the jury to find the defendant guilty. In cases such as this, wherein fraud is charged or attempted to be charged, the good faith or honest belief of a defendant is a complete defense. This is so elementary and fundamental that we feel that it would be an insult to this court's intelligence to burden the record with the citation of authorities.

Error No. XIX.

THE 19TH ASSIGNMENT OF ERROR IS AS FOLLOWS:

> "Juror H. Lewis Haynes: Your Honor, may I ask a question?
>
> The Court: Yes, sir.
>
> Juror Haynes: If it is proper, I would like to have you clarify to me the distinction between 'a particular' and 'a count,' which you refer to in that indictment.
>
> The Court: A what?
>
> Juror Haynes: A particular and a count, which you spoke of in the indictment; you refer to fourteen particulars and six counts, I believe. I do not understand the difference.
>
> The Court: Well, I will go over that again. That was probably due to my confusion or inaccuracies in my statement. The indictment charges first, that he conceived and formed a plan to defraud; that Gilbert

Johnson did devise a scheme to defraud, and it was, in substance, as follows: Now, here follow fourteen particulars in which, according to the indictment and the position of the government, are constituted and made up the scheme to defraud. The instruction was that not all of those particulars constituting the scheme to defraud need to be proven; any of them relating to the letters that were sent would be sufficient. Then, in the last or fourteenth particular, that is divided up into, I think there are twenty-six letters in the alphabet—well, this runs up to L or runs up to O. That made sub-divisions of that fourteenth; that it was further a part of the scheme and artifice to defraud, that the defendant would make fraudulent, false pretenses and promises to the person intended to be defrauded, through and by means of divers circular letters, pamphlets, newspapers, and house organs, publicly circulated and intended to be circulated in effect and substance—

Juror Haynes: A count, then, is just a subdivision under a particular.

The Court: Yes." [Tr. pp. 246-247 for this assignment of error and see pages 214, 215 of the Transcript wherein this language appears in the charge of the court.]

The defendant made the following exception to the charge:

"I also take exception to the court's suggestion that it will be sufficient under the law to find any one of the elements of the alleged scheme as set out in the indictment would be sufficient; that is, if the jury finds any one of those particulars exist, that that would be sufficient to sustain the charge laid in the indictment, so far as the devising of the scheme is concerned.

The Court: Well, there may be some confusion in that. That was qualified or followed by the statement that any one was sufficient to base a conviction on the count in the indictment relating to it.

Mr. Cannon: I take an exception to that modified charge." [Tr. p. 220.]

In connection with this assignment of error, we invite the court's attention to the case of *Brown v. U. S.*, 146 Fed. 219 (C. C. A. 8) wherein the court at page 220 said:

> "It follows that one must be convicted, if at all, on the scheme as alleged, and if the scheme as alleged is not substantially established by the proof he cannot be convicted."

Also the case of *Hendrey v. U. S.*, 233 Fed. 5 (C. C. A. 6) at page 18 the court says:

> "We have often approved the practice of declining to give instructions which, though proper in themselves, would constitute mere repetitions, usually in less intelligible form, of subject-matter consecutively and logically treated in the general charge, but the respondents in a criminal case, no less than the parties in a civil case, are entitled of right to have clearly stated to the jury each distinct and important theory of defense, so that the jury may understand that theory and the essential rules applicable to it. We cannot avoid the conviction that the respondents' rights in these respects in this case were not sufficiently saved by the general charge."

Compare the language above quoted with the unintelligible and misleading charge here complained of.

Error No. XXI.

The 21st Assignment of Error is as follows:

"Now, with respect to these units, you will remember that some discussion was had of them. So far as I am advised, this system of selling in California is not pursued. The unit system or the trust estate, or what is known as the common law trust estate, is, in effect, a partnership; that is, you, the defendant—not a partnership as defined in the California law, but the party offering the trust estate announces that he has a certain property and he invites others to participate with him, not in buying stock in the corporation, but in buying units which give to the parties buying the units actual ownership in the properties then found. That is a legitimate system of business, in the State of Texas at least, and there is no reflection on anybody for adopting such a system. It, itself, does not give evidence of any dishonest motive. There are certain duties, however, which one engages, that are important to be considered.

There is evidence in this case tending to prove that the defendant, operating as a broker under the name of Gilbert Johnson & Company, entered into contracts with several syndicates or companies of which he was the promoter, organizer and dominant head, whereby Gilbert Johnson & Company undertook to sell the units or shares of these syndicates or companies. There is also evidence tending to prove that in selling these units or shares to the public a considerable proportion of the purchase price paid by the public was absorbed by Gilbert Johnson & Company as commissions or expenses or otherwise, so that in many instances a comparatively small proportion of the amount thus paid by the public actually went into the treasury of the respective syndicates or companies

and became available for the development purposes for which they were said to be organized. Further, it is the contention of the government in this case that in soliciting the public to purchase these shares or units the defendant failed to disclose that a large proportion of the money paid for the same would not go to the syndicates or companies, but would be absorbed in commissions and other charges by the said brokerage concern of Gilbert Johnson & Company.

Now, I charge you that the payment of an exorbitant and unreasonable commission, not warranted by the financial conditions or necessities of the occasion and undisclosed to the parties interested, is fraudulent if, in your judgment, they are grossly excessive and are not so disclosed.

And I further charge you that when the shares or units of such concerns as are involved in this case are selling for much more than their par value, it should not require the payment of large commissions to dispose of them. If it does, the selling price must be altogether artificial and the inference may be made by the jury either that the company is fraudulent if the commission is not excessive, or that the commission is fraudulent if the company is what it purports to be. I further charge you that the promoter of a corporation or other similar concern, such as these syndicates, stands in a relation of trust toward those who are invited to purchase the shares or units, and he must deal fairly with them and must faithfully disclose all facts which might influence them in deciding upon the judiciousness of the purchase.

If, therefore, you find from the evidence, beyond a reasonable doubt, that the defendant knowingly so manipulated the several contracts, or any of them, whereby Gilbert Johnson & Company were to sell

these units or shares with a commission so grossly excessive as to convince you that they are fraudulent, and the amount of such commissions or deductions was not disclosed to the purchasers of such units or shares, such a finding by you would make it necessary to find the defendant guilty of devising the scheme to defraud described in the indictment, if, at the same time, you find beyond a reasonable doubt that he did so with the intent to defraud, as I have already defined it to you. And having so found, if you further find that he used the mails to carry the fraudulent scheme into effect, as alleged in the indictment, it will then be your duty to find him guilty as charged." [Tr. 247-250 for this assignment of error and see pages 205-208 of the Transcript wherein this language appears in the charge of the court.]

The defendant made the following exception to the charge:

"I also take exception to the court's instruction with respect to the trust estates, and particularly to the effect that the trust estates constituted a partnership, either under the law of this state or under the law of any other state."

"I also take exception to the court's instruction with respect to the duty devolving upon Mr. Johnson and upon the other trustees of these various syndicates, in the court's holding under the instructions, that there was any obligation on his part to disclose the full amount of the commission was, that he was receiving any commission or any profit from dealing with the particular syndicates themselves, in view of the fact that the declarations of trust themselves provided that he can so do."

"I except to the instructions of the court with respect to the nature of the declaration of trust, in view of the fact that it seems to me—"

Mr. Pratt: I object to the statement of counsel, in view of the fact that it is not the time and place for him—

The Court: Yes, just confine yourself to the exceptions.

Mr. Cannon: I am willing to make a blanket exception to the whole thing, except—

The Court: All right; then, make it.

Mr. Cannon: Except the fact, if the court please, the courts as I understand them, require me to particularize in what respect I object to the charges; and that is all I am attempting to do.

The Court: No, I do not agree with you, counsel, I think you protect your rights fully when you note the exception to that portion of the charge specified." [Tr. pp. 218-19.]

In Assignment Number 21, it occurs to us that court has erred by the use of the following language [Tr. p. 207]:

"Now, I charge you that the payment of an exorbitant and unreasonable commission, not warranted by the financial conditions or necessities of the occasion and undisclosed to the parties interested, is fraudulent, if, in your judgment, they are grossly excessive and are not so disclosed."

We believe that the above quoted portion of the court's charge falls within the condemnation pronounced in the case of *St. Clair v. U. S.*, 23 F. (2d) 76 (C. C. A. 9) at page 79, this court speaking through Judge Rudkin said:

"We will now consider the instruction given by the court to the effect that a scheme to take 50 per cent, or more of the purchase price of shares of the treasury stock as commission and to turn over to the company only 50 per cent, or less of the purchase money, would be a scheme to defraud as a matter of law, unless the purpose to retain the commission was disclosed to the purchaser.

A corporation may lawfully pay a commission for procuring subscribers to, or for selling, its capital stock. Scott v. Abbott (C. C. A.) 160 F. 573; Royal Casualty Co. v. Puller, 194 Mo. App. 588, 186 S. W. 1099; Cranney v. McAlister, 35 Utah 550, 101 p. 985. If an apparently excessive commission is allowed, there may be room for a reasonable inference either that the corporation is engaged in a fraudulent enterprise, or that the agreement for the payment of the commission was fraudulently or improvidently made, but in either case the inference is one of fact and not of law. The stock of an established corporation, having a ready sale on the market, may be sold at a profit on a small commission, while stock of a purely speculative character, having no standing on the market, may only be sold through the greatest efforts, and upon a commission that might seem excessive. So an individual or a corporation may by force of circumstances be compelled to pay what might seem an exorbitant rate of interest, or to give what might seem a large bonus in order to raise money in a particular emergency, and yet the agreement to pay the interest or give the bonus may be prompted by honest motives and by sound business judgment. For these reasons, each case must depend on its own facts and circumstances, and the amount of the commission alone cannot be made the sole criterion of fraud."

Error No. XXII.

The 22nd Assignment of Error is as follows:

> "It is essential only that it be shown that the scheme be formed with a fraudulent intent. It is necessary that the government prove that the scheme or artifice employed by the defendant was of the kind charged in the indictment. It is not necessary that it be proved that the scheme and artifice included the making of all of the alleged false pretenses, representations and promises, *but it is sufficient if any one or more of the same be proved to have been made*, and that the same were designed to and would be reasonably effective in deceiving and defrauding persons with whom the defendant proposed to and did deal."

In connection with said charge the following colloquy occurred:

> "Mr. Cannon: I also take an exception to the court's suggestion that it will be sufficient under the law to find any one of the elements of the alleged scheme as set out in the indictment would be sufficient; that is, if the jury finds any one of those particulars exists, that that would be sufficient to sustain the charge laid in the indictment, so far as the devising of the scheme is concerned.
>
> The Court: Well, there may be some confusion in that. That was qualified or followed by the statement that any one was sufficient to base a conviction on the count in the indictment relating to it." [See pages 250-251 of the Transcript for this assignment of error and see page 198 of the Transcript wherein this language appears in the charge of the court.]

The defendant made the following exception to the charge:

"I also take an exception to the court's suggestion that it will be sufficient under the law to find any one of the elements of the alleged scheme as set out in the indictment would be sufficient; that is, if the jury finds any one of those particulars exist, that that would be sufficient to sustain the charge laid in the indictment, so far as the devising of the scheme is concerned.

The Court: Well, there may be some confusion in that. That was qualified, or followed by the statement that any one was sufficient to base a conviction on the count in the indictment relating to it.

Mr. Cannon: I take an exception to that modified charge."

With reference to the 22nd assignment of error, we again call the court's attention to the fundamental principle of all criminal cases of this character, and that is, that the scheme must be proved *substantially* as charged. We believe the trial court fell far short of that rule in its charge here.

Assignment of Error XXIV.

THE 24TH ASSIGNMENT OF ERROR IS AS FOLLOWS:

"The Court: You are instructed, gentlemen, that these additional instructions are given you together with all the other instructions. I certainly think that you understand that intent must accompany everything. You understand that, of course; that is, the general principle as to all crimes, and I am very sure the jury understand that intent always must be proven in fact. The intent is the intentional—things having been intentionally done, are really the foundation of the case. There might be this to call to your attention, however; certain of these bulletins were

sent out and the statements in them the defendant denied knowledge of. Defendant cannot deny knowledge of what was done by his employees. That is about the only room or occasion I could see for any particular question on intent, Mr. Arterberry.

Mr. Arterberry: One point, if Your Honor please: You will recall that the defendant testified that he received certain information from the driller of the well in Desdemona when Your Honor asked him on cross-examination about the 'well being assured.' The driller told him he was then in the pay sand and he had a well, and he made his representations based on that. Now, if the defendant in good faith and honestly made that representation based on that, he is entitled to the benefit of that.

The Court: Well, the defendant, of course, must have been justified from his knowledge of the situation. *The fact that he believed it to be true, would not exonerate him unless he believed it on a sufficient foundation or evidence."* [See pages 251-2 of Transcript for this assignment of error and see pages 226-227 of the Transcript wherein this language appears in the charge of the court.]

The 24th Assignment of Error is based upon additional charges given by the court to the jury after they had been deliberating for many hours and the jury was seeking further enlightenment. The entire colloquy is not listed in the assignment, as it should have been, but the entire matter is found on pages 224 to 227 of the Transcript, and we invite the court's careful consideration of the entire matter.

Again the court ignores the fundamental principle in all cases of this kind and character and sets at naught the

question of good faith and honest belief when the matter is placed fairly and squarely before the court on that question when he says:

> *"The fact that he believed it to be true, would not exonerate him unless he believed it on a sufficient foundation or evidence."* [Tr. 227.]

The above quoted portion of the court's charge, in our opinion, is thoroughly unsound, as numerous cases hold that a man may be the victim of his own self deception. The Circuit Court of Appeals for the 6th Circuit in the case of *Sandals v. U. S.*, 213 Fed. 569, at page 575 says:

> "A man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure be incapable of committing a conscious fraud. Human credulity may include among its victims even the supposed imposter. If the men accused in the instant case really entertained the conviction throughout that the oil properties and the stock in dispute possessed merits corresponding with their representations, they did not commit the offense charged."

Compare the above with the charge of the court in this case. We believe that this court will be forced to the conclusion that the trial court clearly has invaded the province of the jury and that this error is fundamental.

Errors Nos. XXV. XXVI and XXVII.

We believe these last three assignments of error have already been covered by the argument and authorities heretofore made and cited, hence we shall not repeat same.

An Unfair Trial.

We shall summarize, to some extent, some of the matters heretofore discussed. touching upon the highlights in this case showing unfairness from the very beginning.

First: By dragging the defendant half way across the continent to try him instead of trying him in the state and district of his own domicile.

Second: By making such a scurrilous and abusive attack upon the defendant under the form and guise of an indictment.

Third: By the failure and refusal of the court to give the requested instructions of the defendant.

Fourth: By the court in its charge to the jury, erring in matters of law, and in a partisan one-sided charge, invading the province of the jury on questions of fact, and in effect instructing the jury to find the defendant guilty.

Argument.

We invite the court's attention in our argument to numerous cases to sustain our position on the question of a prejudicial charge given to the jury resulting in an unfair trial, and in this connection we call the court's attention to the case of *Sunderland v. U. S.*, 19 F. (2d) 202 (C. C. A. 8), where the Circuit Court of Appeals of the Eighth Circuit, at page 214, says:

> "It requires no argument to convince that this 'gold brick' illustration was unfortunate and prejudicial. This was finally conceded by the court, and the illustration withdrawn, but we entertain grave doubt whether the prejudice once created could be removed by mere withdrawal of the words. Rudd v. U. S., 173 Fed. 912 (C. C. A. 8)."

In the *Rudd* case, *supra,* we call the court's attention to the language found at page 914:

> "As Chief Justice Fuller said in Starr v. U. S., 153 U. S. 614-626, 14 Sup. Ct. 919 38, L. Ed. 841, the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference and may be controlling. So positive and emphatic were the remarks of the court that it is not too much to say the jury may have believed a finding for the accused would have subjected them to ridicule. True, the court afterwards withdrew the language, and said that, 'It does not follow that a man is a fool or insane who believes the representations,' and that it was a question for the jury; but it is doubtful the damage was repaired, and when that is the case the just remedy is a new trial. A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain."

Quoting further from the *Sunderland* case, *supra,* at page 216:

> "While the judge in the federal courts 'may comment on the evidence and may express his opinion on the facts, provided he clearly leaves to the jury the decision of fact questions' (Weare v. U. S., 1 F. (2d) 617 (C. C. A. 8) (and cases cited), yet as was said in the same case, 'The instructions, however, should not be argumentative, the court cannot direct a verdict of guilty in criminal cases, even if the facts are undisputed. (Dillon v. U. S. (C. C. A.), 279 F. 639.) It should not be permitted to do indirectly what it cannot do directly and by its instructions to in effect argue the jury into a verdict of guilty.' See also, Parker v. U. S., 2 F. (2d) 710; Cook v. U. S. (C. C. A. 8), 18 F. (2d) 50.

> We think the charge in the case at bar, taken as a whole, was clearly argumentative." * * *
>
> "While the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assistant prosecutor or a thirteenth juror."

We think the court's charge in the *Sunderland* case, from which we have quoted, is similar in many respects to the charge in the case at bar, particularly the illustration drawn by the court in the *Sunderland* case regarding the 'gold brick' swindle with the trial court's charge in the case at bar, wherein the court uses this language:

> "The fact, however, that the defendant says he believed all these things that were stated, does not necessarily control you in your judgment. You do not have to believe that if *I am caught in the act of setting fire to a house and I say to the officer, 'Well, I did not intend to burn that house,' he does not have to believe that, and probably would not.*" [See pages 211 and 212 of the Transcript.]

And again, at page 213 of the Transcript, the court says:

> "They say that 'Straws tell which way the wind blows,' now, it might be that the defendant did not consider that extremely important, but *he was used to making reckless statements. That is an element that you may consider properly in this case, that there were extravagant statements made. Of course, there is no denying that.*"

And, again on page 213 of the Transcript:

> "The evidence in this case shows that from the very beginning this defendant pursued a consistent

line of advertising, *and I will not, I think, go too strong in calling it extravagant advertising. It is a little singular, gentlemen, that if he was honest in this belief, that that continued.*"

And again, on this same page of the Transcript, we find this language:

> "*Well, now, the defendant might have been entirely innocent; he might have honestly believed that, but his honest belief is not sufficient unless the facts warranted him in expressing such belief, unless his information and the facts warranted him.*"

And, again, at page 227 of the Transcript:

> "Well, the defendant, of course, must have been justified from his knowledge of the situation. *The fact that he believed it to be true would not exonerate him unless he believed it on a sufficient foundation or evidence.*"

We have quoted several paragraphs from the court's charge in this case and we believe that from a reading of the whole charge and the exceptions taken thereto, together with the court's comments at the time the exceptions were made, shows that said charge was highly prejudicial and wholly unfair and this defendant did not receive at the hands of the court a fair or proper charge to which he was entitled.

On the question of an unfair charge, we respectfully call the court's attention to the dissenting opinion of the late lamented Judge Rudkin in the case of *Campbell v. U. S.*, 12 F. (2d) 873 (C. C. A. 9) at page 877, wherein this language is used:

> "The charge to the jury was largely argumentative in form and favored the government throughout.

> Inferences of fact were placed on the same footing as inferences of law, and no distinction whatever was made between implied fraud and actual fraud. In the end the verdict was made to turn upon the abstract legal right of the accused to pay commissions on sales of shares out of the proceeds of such sales, regardless of his belief or good faith in the premises. Indeed, no attempt was made on the oral argument to uphold the charge of the court, but the government pleaded for affirmance on the sole ground that the proof of guilt was so overwhelming that errors committed during the progress of the trial were not prejudicial. With such a contention I am unable to agree. A fair and impartial trial by jury is the constitutional right of every person accused of crime, whether guilty or innocent, and that constitutional guarantee is not satisfied by a partisan one-sided charge to the jury."

It is interesting to note that Judge Rudkin, in writing the opinion in the case of *St. Clair against the United States,* 23 F. (2d) 76 (C. C. A. 9) wherein this Honorable Court in an unanimous opinion in effect overruled and nullified the doctrine as announced in the *Campbell* case, and that the late Judge Gilbert who concurred in the majority opinion in the *Campbell* case, concurred in the opinion of the later *St. Clair* case.

In addition to the above authorities from which we have quoted on the question of an unfair trial, we call the court's attention to the following:

- *Rutherford v. U. S.,* 258 F. 855 (C. C. A. 2);
- *Connley v. U. S.*, 46 F. (2d) 53 (C. C. A. 9);
- *Adler v. U. S.*, 182 Fed. 464 (C. C. A. 5);
- *Glover v. U. S.*, 147 Fed. 426 (C. C. A. 8), 8 Ann. Cas. 1184;
- *People v. Mahoney*, 201 Cal. 618, 258 Pac. 607.

Conclusion.

We respectfully submit that we have clearly shown three main reasons, any one of which, not only justify, but, according to law, demand a reversal of this case, namely:

First: The failure of the trial court to sustain the motion to quash the indictment herein for the reasons set forth in said motion, based upon the points and authorities submitted therewith.

Second: The failure and refusal of the trial court to give each and every of the requested instructions of the defendant.

Third: Errors committed by the trial court in giving its instructions to the jury, and which said insructions given were argumentative, unintelligible, partisan and one-sided and highly prejudicial to the rights of the defendant. We anticipate that counsel for the Government in their brief when they attempt to defend and excuse the many matters herein complained of will attempt to seek refuge under the sheltering wing of section 269 of the Judicial Code, as amended (28 U. S. C. A. Sec. 391); we challenge them on that very question by quoting the language of the late Judge Rudkin of this court in the St. Clair case, 23 F. (2d) 76, at page 80:

> "The defendant in error contends, however, that the evidence of guilt as to the several plaintiffs in error was utterly overwhelming, and that, if any error was committed by the court, they were not prejudiced thereby. In support of this proposition, our attention is again directed to section 269 of the Judicial Code, as amended (28 U. S. C. A. 391, Comp. St. 1246), which provides:

'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.'

That provision is not applicable here. As said by the Supreme Court in United States v. River Rouge Co., 269 U. S. 411, 421, 46 S. Ct. 144, 147 (70 L. Ed. 339):

'The present case is not controlled by the provision of section 269 of the Judicial Code, as amended by the Act of February 26, 1919 (28 U. S. C. A. 391; Comp. St. 1246), that in an appellate proceeding judgment shall be given after an examination of the entire record, "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." We need not enter upon a discussion of the divergent views which have been expressed in various Circuits Courts of Appeals as to the effect of the act of 1919. It suffices to say that since the passage of this act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties—especially when embodied in the charge to a jury—is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party.'

Only enough of the evidence has been brought to this court to present and explain the assignments of error, so that the government has not met the burden of showing that the error was harmless or without prejudice.

For error in the instruction, the judgment of the court below is reversed, and the case remanded for a new trial."

For the reasons herein set forth, we respectfully urge that the judgment of the lower court be reversed.

Respectfully submitted,

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